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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~580~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY FOR PETITIONER FRED T. MACKEY

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REPLY FOR PETITIONER FRED T. MACKEY

I.

THE WAGERING TAX FORMS WERE ADMITTEDLY RELEVANT AND OF GREAT SIGNIFICANCE IN PROVING PETITIONER'S GUILT; THEY WERE AN IMPORTANT AND RELEVANT LINK IN THE CHAIN OF EVIDENCE NEEDED TO PROSECUTE, AND THEIR ADMISSION IN EVIDENCE AT TRIAL RENDERED PETITIONER'S TRIAL INQUISITORIAL RATHER THAN ACCUSATORIAL; THEREFORE, PETITIONER'S PRAYER FOR A NEW TRIAL ON CONSTITUTIONAL GROUNDS IS PROPERLY COGNIZABLE AND SHOULD BE GRANTED UNDER 28 U.S.C. 2255.

A. The fact that coerced evidence or its fruits was admitted in the criminal trial should automatically require a new trial free of such evidence or its fruits.

The government's brief on Point I of their Argument is not a model of clarity. We understand its argument

to be that the use of the wagering tax returns in the criminal trial was harmless error under the rule of *Chapman* v. *California,* 386 U.S. 18. *Chapman* requires the government to show beyond a reasonable doubt that constitutional error was so unimportant and insignificant that it made no contribution to a conviction. *Harrington* v. *California,* 395 U.S. 250 reaffirms and further applies *Chapman* and holds that in a criminal case not woven from circumstantial evidence[1], a departure from constitutional procedures could be considered harmless beyond a reasonable doubt where the evidence of guilt is "overwhelming".

At least on this point in its argument, the government concedes constitutional error at Petitioner's trial. But the government then seemingly argues that because Petitioner did not raise the issue of self incrimination at trial (which was an issue foreclosed to him because of the then viable *Kahriger* and *Lewis* decisions; Petitioner's Brief, 30-32), he now must in these Section 2255 proceedings assume the burden of affirmatively showing that the challenged evidence played a "significant" part in bringing about his conviction (Brief, 20). Thus, if we read the government's argument rightly, and we are not sure we do, the burden apparently should now be upon the Petitioner to show for the first time in this Court that

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[1] It is important to note here, although this point will be brought up again in this Reply, that the net worth tax evasion case against Petitioner was entirely woven from circumstantial evidence. It is a unique type of criminal case which is "something more than the ordinary use of circumstantial evidence in the usual criminal case"; *Holland* v. *United States,* 348 U.S. 121, 124.

the wagering tax returns and the summary exhibit based thereon (ex. 765) played a significant part in his conviction, after the District Court and the Court of Appeals on four separate occasions have reviewed the record in this case. This we can and will do later in this Reply; see p. 8, *infra*. But we question the propriety of the government's request to this Court to review the criminal trial record, in light of the fact that the District Court has reviewed the evidentiary impact of these exhibits and deemed Petitioner's constitutional attack as such a "new and serious question" (App. 28), that it did not require an answer by the government to the petition for relief under Section 2255. Nor did the government seek to file an answer in the District Court in these 2255 proceedings in which it could have raised the affirmative defense of *Chapman*, or any other affirmative defense that it now raises for the first time in this Court.

We do not believe it is important or necessary to criminal justice, or a decision in the case at bar, for this Court to provide new guidelines for the lower federal courts concerning the application of *Kaufman* v. *United States*, 394 U.S. 217. These guidelines are in existence. In *Kaufman*, this Court held that constitutional error at trial could be collaterally attacked in a 2255 proceedings. In *Chapman* and again in *Harrington*, this Court laid down the guidelines for such an attack; i.e. the burden is on the government to show beyond a reasonable doubt that constitutional error at trial was unimportant, insignificant and harmless. This burden is no more or less than the "beyond a reasonable doubt" burden that the government always shoulders in a criminal trial. Furthermore, we question whether the rule in *Kaufman* is properly before this Court in this cause. The Court of

Appeals below found it controlling in the case at bar against the contention by the government that it was not (App. 49), and the government has filed no cross-petition for a writ of certiorari in this Court to question that ruling.

Moreover, and most important, we earnesly urge this Court to reaffirm what we believe is the settled rule that the use at trial of evidence, or the fruits of evidence, coerced from a defendant in violation of the privilege against self incrimination can never be harmless error, either under *Chapman* or any new standard of "significance" urged upon this Court by the government. Such a rule was obviously presumed by the Courts below and is implicit in their opinions. This rule would reaffirm the essential nature of the prvilege, that is, it protects a person against an inquisitorial trial, or a trial in which evidence is admitted which was procured in an inquisitorial proceeding, by affirmatively protecting the person's right to an accusatorial trial.

The essential fallacy of the first paragraph of the government's argument is that it assumes or presumes that the thrust of Petitioner's attack upon his conviction is that certain evidence was wrongfully admitted against him at trial. This is most certainly wrong. Evidence was wrongfully admitted at the criminal trial, but we do not raise this as an evidentiary question. The privilege against self incrimination is not a rule of evidence; it arises out of our history as British subjects and American citizens. At its broadest, the privilege does represent and protect a "complex of values" such as the right to be left alone, the abhorrence of torture, a recognition that coerced confessions are not reliable, and other values;

Murphy v. *Waterfront Commissioners,* 378 U.S. 52, 55; *Miranda* v. *Arizona,* 348 U.S. 436; and see Levy, *Origins of the Fifth Amendment,* (Oxford Univ. Press, 1968), pp. vii-viii. These are some of its social and political antecedents in history. But this Court has further defined its essential rock-bottom meaning to our legal system as a "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay;" *Malloy* v. *Hogan,* 378 U.S. 1, 7. Thus, "[g]overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth"; *Malloy,* 378 U.S. at p. 8; *Miranda* v. *Arizona,* 348 U.S. 436, 460.

It is these decisions of this Court that provide the predicate for Petitioner's attack upon his conviction. He has a right established in about 1700 and now protected by the Fifth Amendment to a trial fully accusatorial in nature. Petitioner never received an accusatorial trial, because his trial in relevant and significant part was inquisitorial in nature.

The government's argument in this case is a massive assault upon the privilege against self incrimination. There is no case that we can find, or the government can cite, which holds that the privilege against self-incrimination can be violated or even violated a little bit, and the fruits of this violation then used against the defendant in a criminal trial. This is the impact of what the government urges this Court to hold. Thus, as the government apparently argues, a statement can be coerced from a defendant that he owned a murder weapon, and

this statement can be admitted against him if evidence of his guilt is "overwhelming". And, as the government further argues, if that defendant's counsel fails to object to this clear violation of his rights, then the defendant must subsequently show that the use of his coerced statement was "significant" to his conviction. Or, and more subtly, reports can be coerced by legislation from persons under the fear of punishment for the purpose of providing evidence or leads to evidence for prosecution. These reports may then be used against the person if the prosecutor believes the other evidence will be overwhelming, or if he hopes the privilege will not be raised so that the defendant will later need to show "significance." We doubt if there is a prosecutor who does not believe his evidence is "overwhelming" and if it is not, well why not take the chance.

The Supreme Court of California has very recently specifically rejected an argument almost identical to the one made by the government in the case at bar; *Byers* v. *Justice Court,* ..... Cal. 2d ....., 80 Cal. Rptr. 553, 459 P. 2d 465 (1969); Petition for writ of certiorari filed *sub nom California* v. *Byers,* Jan. 13, 1970, No. 1070. There, that Court specifically held in reliance upon the decisions of this Court that absenting immunity granted, the State by statute could not compel written reports and disclosures from a person involved in an auto accident. The Court held in words which utterly demolish the argument made by the government in the case at bar, and in theory which we urge should cause this Court to examine whether the "harmless error" doctrine can be applied to self-incrimination cases, as follows (80 Cal. Rptr. at p. 559):

"It does not matter, as the People appear to contend, that in some 'hit-and-run' situations prosecuting authorities may be able to establish the driver's identity beyond a reasonable doubt from other evidence such as eyewitness identification of the driver, his vehicle, or its license plate. '[T]he basic purposes that lie behind the privilege against self-incrimination * * * relate * * * to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."' (*Tehan* v. *U. S. ex rel. Shott*, 382 U.S. 406, 415, 86 S. Ct. 459, 464, 15 L. Ed. 2d 453) 'Government, state and federal, are * * * constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.' (*Id.* at p. 414, 86 S. Ct. at p. 464.)"[2]

That is what the case at bar is all about; i.e., will the privilege against self incrimination and its purposes be upheld by this Court as an absolute defense to the use of coerced evidence or its fruits in a criminal trial; and will Petitioner be afforded a fully accusatorial trial?

Finally, if this Court should hold that the harmless error rule is applicable to criminal trials in which coerced evidence or its fruits is admitted, we see no cogent or

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[2] Compare *United States* v. *Lucia*, 5 Cir., 416 F. 2d 920 (1969).

sensible reason for further dilution of the *Kaufman-Chapman* rules in retroactivity cases such as the case at bar. Why should the burden of showing significant constitutional error now shift to the Petitioner simply because he now makes a claim of constitutional error not available to him at trial because of this court's prior decisions since overruled? We join with Petitioner in *Elkanich* v. *United States,* No. 1142, now pending in this Court, in earnestly arguing to this Court that a vindication of a person's federal constitutional rights should not be impeded by further fine drawn distinctions spun around the words "collateral" or "direct" review. Either a defendant was convicted in derogation of his constitutional rights or he was not. Either the harmless error rule of *Chapman* applies to the attack on the conviction or it does not. We do not believe it applies to a conviction obtained through the use of coerced statements or their fruits. If the *Chapman* rule does apply, either this constitutional error was harmless beyond a reasonable doubt, or it was not. These general principles are ones easily understood and applied by the Courts, lawyers, and most important, the people who are protected by these rights.

B. As a matter of fact, the wagering tax returns and summary exhibit (Exhibit 765) were relevant and significant to the government's case, and their use at the trial was not harmless error.

Assuming that the *Chapman* rule does apply to the case at bar, and regardless of who has the burden of proof on this issue, the use of the wagering tax returns and ex. 765 at trial was not harmless error within its terms, be-

cause this evidence was relevant, significant and vitally important to the government's case. The argument of the government in this Court that the wagering tax returns were not significant, and their use might have been foregone had Petitioner raised a constitutional objection which he did not have at trial, is belied by the record at trial. In connection with a review of the relevant record, it must be kept in mind that Petitioner's net worth trial was purely a circumstantial case, there was no evidence of specific items of unreported income, and a net worth case is something more than the usual circumstantial criminal case; *Holland* v. *United States,* 348 U.S. 121, 124.

I. We think it specious for the government to argue now, and for the first time, that had Petitioner raised an objection because of the privilege at trial, the government would have decided not to use the wagering tax returns. The viable *Kahriger-Lewis* cases held that Petitioner had no privilege to raise, and would have provided ample ground for overruling any such objection. But the government faced a more serious and significant threat to the integrity of its trial because of the use of these returns than a useless Fifth Amendment objection by Petitioner. And it faced this threat with equanimity because it intended to and succeeded in establishing in the trial court that these returns were relevant and important to its case.

In *United States* v. *Accardo,* 298 F. 2d 133 (1962), the Court of Appeals for the 7th Circuit had specifically held that the admission of tax returns against a defendant in a criminal tax case which characterized him as a gambler where such returns were irrelevant to the gov-

ernment's case was prejudicial and reversible error.[3] This is why Petitioner's counsel objected to these returns as prejudicial in the trial. The District Court was aware of this decision (e.g. A.A. 1382-1385, 1846); and this is why, as the government points out (Brief 7-10), the District Court below denied admission on two occasions to the wagering tax returns until the government could make some showing that the information contained in the returns as summarized on ex. 765 was not included in the Schedule C forms to Petitioner's income tax returns (exs. 1-13).

But the government now belatedly argues in this Court that the Schedule C forms contained the words "policy" or "policy wheel", thus the wagering tax returns were superfluous and "not significant" to their admitted use as a likely source of unreported income. This argument again is belied in the record of the trial and by the government's own admissions.

First, we doubt that the words "policy" or the one use of the word "policy wheel" as used in Petitioner's *income* tax returns within the context of a case replete with testimony about and exhibits concerning insurance companies, their policies or their policy income, were sufficient to characterize Petitioner as a gambler. In fact, the prosecutor never argued to the Jury that these *income* tax returns showed that Petitioner was a gambler and had a likely source of unreported income from gambling.

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[3] There is a line of authority in accord; e.g., *Massei* v. *United States*, 1 Cir., 241 F. 2d 895; *United States* v. *Dressler*, 7 Cir., 112 F. 2d 972; *Echikovitz* v. *United States*, 1 Cir., 25 F. 2d 864; McCormick, *Evidence*, para. 157, p. 327 (1954 ed.); Wharton, *Criminal Evidence*, Vol. 1, para. 344, pp. 486-7 (11th ed., 1935).

Secondly, and most important, and as the government ell knows, likely source of unreported income is proved n net worth cases in one of two ways. Where the tax- ayer declared ownership of a business it is considered ufficient proof of likely source for the government to stablish that the *disclosed* business was capable of pro- ucing much more income than was reported; where ne taxpayer is the owner of an *undisclosed* business, roof that the *undisclosed* business was capable of pro- ucing income is considered sufficient; *Massei* v. *United tates*, 1 Cir. 241 F. 2d 895, 901 (1957); and see *Hol- nd* v. *United States*, 348 U.S. 121, 138; *United States Johnson*, 319 U.S. 503.

Thus, if "policy" in Petitioner's income tax returns as considered as a *disclosed* gambling business or source rom which income was obviously reported in these in- ome tax returns, the government at trial had to show at this *disclosed* business or source was capable of roducing much more income than was reported. Or, if policy" as reported in the income tax returns was too ebulous a term within the context of the case upon hich the government could fairly argue that gambling as a *disclosed* source of income which was capable of roducing much more income than was reported, then the agering tax returns were relevant and significant to ow that Petitioner had an *undisclosed* gambling source unreported taxable income. The government had it ther way in the use of the wagering tax returns.

There is no mystery or speculation concerning the rele- nce or importance of these exhibits to the government. represented to the District Court below in the crim- al trial that they were necessary to show a source of

unreported income (A.A. 229-231; 1382-1385); witness Harrington and his exhibit 765 were specifically put on and the exhibit admitted to show that the wagering tax returns disclosed more income from gambling than was reported in Petitioner's income tax returns. This is specifically stated by the government in its Brief in this Court (8-10). In addition to that admission made in this Court, the clearest exposition of the necessity and importance of the wagering tax returns to the government in the criminal trial is found in an admission made in its Brief in the Court of Appeals in the criminal appeal. There, it specifically pointed out, in order to escape the effect of *Accardo,* that the wagering tax returns were relevant and necessary to show Petitioner was a gambler, and were further necessary to show he had a bigger income from that source than his income tax returns showed, as follows (Brief for Appellee in No. 14584 in the Court of Appeals, pp. 42-43)(*):

> "(2) Here the likely source of appellant's huge net worth increases with his policy wheel operation. (Govt. Exs. 9-13, Sched. C; 765.) Judge Learned Hand, speaking for the Second Circuit in *United States* v. *Costello,* 221 F. 2d 668, 671-672 (C.A. 2d), affirmed, 350 U.S. 359, stated, 'There was no difficulty in the case at bar in pointing to such a source [of unreported taxable income]. By his own admission Costello was a gambler * * * an occupation with

(*) That Brief was filed with the four volume Appellant's Appendix and Appellant's Brief in this Court as part of the record in the case at bar.

indeterminate possibilities * * *.' We submit that if a gambler may make an 'indeterminate' amount of money, *a fortiori* a policy wheel operator may.[22]"

* * * * *

"It follows from what has been said that the admission into evidence of the wagering tax returns was not 'prejudicial error' (Br. 72), for they constituted a part of the Government's case on the important issue of a likely source of unreported taxable income. *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7th), certiorari denied, 335 U.S. 853.[23]"

"[22] There was no direct proof that any of appellant's unreported income arose from his activities as a numbers banker. (Indeed, if there had been the Government would have had no need to use the cumbersome net worth method.) But direct evidence is, of course, not required. *United States* v. *Johnson*, 319 U.S. 503, 517; *Holland* v. *United States*, *supra*, p. 138."

"[23] Although appellant's income tax returns indicated that he was in the policy wheel business (Govt. Exs. 9-13, Sched. C) the ostensible scope of that operation was drastically modified by his reporting a net figure ('ins' minus 'payouts') as 'Total Receipts' on those forms. Government's Ex. 765—based on the wagering tax returns, Form 730—showed that in fact it was a much larger operation. (A.A. 1364-1373.) This is not to say, of course, that the Government claimed or implied that there was any direct proof of unreported net income from the policy wheel operation, but only that the wagering tax returns proved that it was a bigger business—and hence a more likely source of unreported income—than the income tax returns indicated."

Thus, and until it filed its Brief in this Court, the government has never deviated from its prior argument consistently maintained that these wagering tax returns were relevant and important to its case in order to escape the consequences of *Accardo*. Had this argument gone against the government either in the trial court or the Court of Appeals in the criminal case, Petitioner would have been entitled to a new trial under the authority of *Accardo*. In these 2255 proceedings, the government never questioned the relevancy or significance of these returns in the Courts below, and, as has been previously noted, both Courts below rightly assumed they were significant. The Government now, and for the first time, puts itself in the anomalous position of stating that these wagering tax returns could have been easily omitted from its case; therefore, and inexorably, implying that their use served no other significant purpose than to prejudice the minds of the jurors with the irrelevant fact that Petitioner was a gambler in direct violation of the decision in *Accardo*.

In any event, whether these wagering tax returns were introduced and admitted for the avowed and necessary purpose of either showing an undisclosed source of unreported income or that a disclosed source of income did produce a greater income than was reported, or, for the unavowed purposes of prejudicing the jurors with the irrelevant and prejudicial fact that Petitioner was a gambler, *they were obtained from and used against Petitioner in violation of his privilege against self-incrimination*. That is the fact which is dispositive of the case at bar.

II. The record of the criminal trial further belies the government's contention in this Court that the wagering tax returns were not significant to its case. The criminal trial was a long trial, and, as in all net worth cases, numerous witnesses testified and many documents were tediously admitted primarily to lay the foundation for the testimony of the government's summary technical witnesses and for the admission of their summary exhibits. These witnesses and exhibits purport to summarize what the raw mass of evidence is supposed to mean; e.g., see the testimony of Kallimani, 1342 et seq., and the testimony of Harrington, 1363 et seq. In fact, as the government pointed out, there were over 800 exhibits consisting of approximately 1,025 separate pieces of paper admitted at the trial. (A.A. 1858)

The question inevitably arises, which of these pieces of paper did the prosecutor consider important enough and relevant enough at the trial to isolate from the mass of exhibits and specifically point out to the jury? Obviously, the government's summary exhibits which purported to sum up the foundation evidence in its favor were mentioned the most. The government's final summary exhibit (ex. 800, A.A. 2102 et seq.) was mentioned six times by the prosecutor in his final argument (A.A. 1864-1865-1869-1871-1926). Exhibit 8, another summary of net worth and personal expenditures was mentioned once (A.A. 1865). Exhibit 196, another summary sheet of payments, was mentioned once (A.A. 1867-68). Exhibit 899, another summary exhibit, was mentioned twice (A.A. 1919 and 1926). Exhibit 102, a Board of Directors minutes of meeting was mentioned once (A.A. 1872). Exhibit 482 a summary of premium income and exhibit 483 which were corporate deposit slips of one of the insurance companies were mentioned once each (A.A. 1916).

And the Jury was "invited" to look at the wagering tax returns and/or ex. 765 summarizing these returns on *four* separaae occasions. These "invitations" were as follows:

A.A. 1875: "Mrs. Fannye Benford would suggest to you, ladies and gentlemen, Mr. Fred Mackey never went near those three safes. Mrs. Fannye Benford would have you believe, ladies and gentlemen, that Mr. Fred Mackey never had $50,000. The very testimony 'He don't have that kind of money. He didn't have that kind of money.'

"May I suggest, ladies and gentlemen, in your examination of the evidence in this case and particularly the documentary evidence, that you take a look at Government's Exhibits 51 through 89, and may I suggest in connection with that, to expedite your examination, Government's Exhibits 765, another one of Mr. Harrington's now famous charts. His Honor will instruct you on what use these may be to you. They are not evidence. They are merely to aid you and assist you so you do not have to get your papers and pencils out and do your computations. But look at Government's Exhibit 765, and you determine on the basis of varied documents prepared at the direction of the defendant by Miss Laura McComb from books and records and information given her by the defendant, whether Mr. Fred Mackey ever had $50,000.00."

A.A. 1920: "I talked about Government Exhibit 765 this morning, Mr. Downing talked about it this afternoon, and I am talking about it again. What is Government Exhibit 765?

"It is no more or less than totaling figures from Government Exhibits 30 through 89, the so-called 730 returns, the so-called wager tax returns, the so-called, as Mr. Downing refers to them, policy returns —policy, to be sharply distinguished from the policy

written by Gibraltar Insurance Company, or Gibraltar Mutual Life Insurance Company.

"Those returns, if you recall the testimony of Miss Laura McComb, were prepared by her, at least from 1958 on, and they were prepared by her from information given to her by none other than this defendant, Fred Mackey. There is where the information came from.

"Oh, it is true, that Mr. Smith talked about the 'ins', and the 'outs', but who was the only person that really knows whether all of the 'ins' are in, and who is the only person who really knows whether all of the 'outs' were really paid out? Not Frank Smith, not Laura McComb, not Mr. Kallimani, not Mr. Harrington, not Mr. Blackwell. There sits the only man who knows whether those forms were correct. Nobody in the government knows that.

"Mr. Downing wants a likely source for the increases in net worth. I respectfully suggest that Government Exhibit 765 is a most likely source."

A.A. 1923: "How stupid can he be, is the question? Or how crafty was he trying to be? What was he trying to conceal? What was he trying to hide?

"I respectfully suggest to you that he was really trying to hide the true amount of what the 'ins' should have really been on Government Exhibits 39 through 80, and he was really trying to hide that the 'outs' were not as much as he would like you to believe. That is what I would suggest he was trying to do."

A.A. 1928: "But does Mr. Downing overlook Government Exhibits 30 to 89? Does he overlook what really Exhibit 765 is? It is merely a summary of tax returns, and if all of the 'outs' were paid out, and all of the 'ins' reflected are the only 'ins', those tax returns are in good shape. But there is only one man who can answer that question. That man

is not Frank Smith; that man is not Mr. Harrington."

The government now and belatedly argues here that these returns were not significant, yet except for its summary exhibit No. 800, no other of the mass of exhibits was isolated and pointed out to the jury as many times as these wagering tax returns and ex. 765. And, of equal significance, the government *never* "invited" the jury to look at the Schedule C Forms on Petitioner's income tax returns (exs. 9-13) for the purposes it invited the jury on four separate occasions to look at the wagering tax returns. Again, we need not speculate on the relevance or significance placed by the government on the wagering tax returns at trial, in order to admittedly show the Jury that Petitioner was a gambler and had a likely source of greater income than he reported in his income tax returns as income from "policy". It is in the trial record in the prosecutor's own words and actions while on trial.

III. In its statement (Brief 2-8), the government states certain computations and figures as specifically and easily proved facts presumably in evidence. These were not facts introduced in the criminal case but opinions and conclusions of the government's experts. For one of these figures, i.e. that Petitioner acquired more than $1,000,000 in new assets (Brief 3-4), there is no citation to the record because there is none. This was a contention of the government, not a fact in evidence. Petitioner did indeed argue that assets imputed to him in fact belonged to The Gibraltar Insurance Companies and the investment company simply because these assets were held by these companies in their names as the govern-

ment's evidence showed. The government further states that these companies had certain losses and certain gross income but we cannot find support for the figures stated in the citations to the record to support these statements.

Petitioner rested at the close of the government's case and moved for acquittal (A.A. 1843 et seq.). The record again belies the government's argument and statement in this Court that the evidence and case against Petitioner was overwhelming. If its unrebutted case were overwhelming, then why did the Jury require deliberation of approximately 43 hours over a period of five days? (A.A. 1970-1978). Any jury deliberates for such a period of time simply because the prosecution's case is thin and weak. We believe it can be fairly inferred that the wagering tax returns which the prosecutor invited the Jury to look at four times in final argument, was the conclusive and decisive evidence that terminated the deliberations of a Jury obviously not very convinced by the government's case.

II.

THE RATIONALE OF MARCHETTI AND GROSSO DOES PRECLUDE THE ADMISSION INTO EVIDENCE OF WAGERING TAX RETURNS OR THEIR FRUITS IN ANY CRIMINAL PROSECUTION.

Marchetti-Grosso squarely held that the wagering tax statutes coerced evidence and information from gamblers in order to provide evidence or leads to evidence to the government in order to prosecute gamblers. No immunity from the use of this evidence or its fruits were given to gamblers in the wagering tax statutes, and this Court specifically refused in *Marchetti-Grosso* to grant immunity principally because this Court found it was the

specific intent of those statutes, as expressed therein, that the information be afforded to prosecuting authorities; *Marchetti,* 390 U.S. 39, 58-59. And as noted in Petitioner's Brief in chief (16), it was specifically admitted by the I.R.S. that information collected from gamblers under the wagering tax statutes was used to prosecute gamblers on charges of evasion of both income and wagering taxes.

The government now argues that the use of coerced statements, or at least the use of coerced statements within the *Marchetti-Grosso* decisions, should be examined on a "transactional" basis rather than on a "testimonial" basis. That is, it argues that the coerced statements or its fruits cannot be used in a specific gambling prosecution, but they may be used in another prosecution even if that other prosecution involves gambling and its income as a related and integral part of that other prosecution.

This Court has laid to rest any argument concerning whether the privilege against self-incrimination is a transactional or a testimonial privilege by clearly holding that its protection is testimonial. That is, if the privilege is violated, or if testimony be compelled upon immunity granted, the witness may be prosecuted for a crime about which the testimony relates, but the compelled testimony and its fruits cannot be used "*in any manner* by federal officials" in connection with a criminal prosecution against the witness: *Murphy* v. *Waterfront Commission,* 378 U.S. 52 at p. 79.

Or, to put it in another way, coerced statements even if not necessary to the proof of the government's case in the criminal prosecution, fall within the privilege's

protection if they at least provided evidence or leads useful to the government; cf. *United States* v. *Feldten*, No. 87, February 24, 1970, 38 LW 4153, 4154.

Two State Supreme Courts have recently held in reliance upon this Court's decisions that the privilege is testimonial and thus protects against the use of the coerced evidence or its fruits *in any manner* unless full and complete immunity from its use is fully granted; see *Zicarelli* v. *New Jersey State Commission*, 55 N.J. 249, 261 A. 2d 129 (1970); *Byers* v. *Justice Court*, ... Cal. 2d ....., 80 Cal. Rptr. 553, 458 P. 2d 465 (1969), Petition for a writ of certionari filed *sub nom California* v. *Byers*, January 13, 1970, No. 1070.

Thus, Petitioner is protected by the privilege against the use of a coerced statement *in any manner* in a criminal prosecution. If this Court could not read immunity into the wagering tax statutes because of their expressed intent that prosecuting authorities have full use of the coerced statements in prosecuting gamblers; then *a fortiori* the full use of these coerced statements by federal prosecuting authorities against Petitioner in a criminal prosecution related to gambling most certainly violated the privilege.

The government's further argument that Petitioner was not factually incriminating himself when he was filing the coerced returns is absurd (Brief 23-25). This is not a specific item evasion case where a taxpayer suddenly decides on April 15th that he is not going to include certain items of income in his return. The indictment years were for 1955 thru 1960 inclusive. The wagering tax returns were filed for each month during those years. The theory of the government's case in

the criminal trial was that a) Petitioner was a gambl
that b) during the taxable year he had income fr
gambling allegedly in excess of that reported in his w
gering tax returns, that c) while he was allegedly hidi
this excess by filing wagering tax returns which alleged
did not include all of his gambling receipts, he was al
allegedly hiding his gambling income by purchasing a
sets in the names of regulated insurance companies a
investment companies which he controlled, and d)
allegedly finalized this scheme by allegedly filing a fal
income tax return which continued to understate h
previously concealed and hidden income from gambling.
Thus, under the government's theory of the criminal cas
if Petitioner was engaging in this scheme to wilfully u
derpay his income tax, he would be engaging in it a
year long, and an integral and prior part of the schem
would be the filing of the wagering tax returns whi
were presumably false.[6] In other words, he would ha
to file the coerced wagering tax returns and understa
his gambling income thereon each month during the ye
before he filed his income tax return which allegedly al
understated his gambling income for that year. Th
was the government's theory of the case which it no
seemingly professes to reject in this Court.

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[5] Thus, part of the government's theory in the criminal tri
was that Petitioner was concealing unreported gambling income
purchasing assets in the names of regulated insurance compani
and investment companies. Under its theory of the case now f
the first time advanced in this Court, evidence to support su
allegations was also insignificant, not important and presumab
irrelevant, because these alleged purchases were made prior to t
filing of Petitioner's income tax returns each year.

[6] Petitioner has never been indicted for filing false wageri
tax returns.

Therefore, and within the government's theory of the criminal case at trial, every time Petitioner filed a wagering tax return he was providing, and did in the event provide, a significant link in the chain of evidence needed to prosecute and convict of a crime which he was alleged to be continually committing during the indictment years. Indeed, any risk of self-incrimination could only be described as "imaginary and unsubstantial" if the wagering tax returns were in fact true, and if the Schedule C forms reporting income from gambling were also true after taking into account the "ins" and "outs" not reflected in the wagering tax returns. Then, and in that event, Petitioner is and was not guilty of the crime charged, and was found guilty by a Jury which deliberated five days, and whose ears rang with the continued "invitation" of the prosecutor to remember he was a gambler.

III.

MARCHETTI-GROSSO SHOULD BE RETROACTIVELY APPLIED.

There is a certain air of unreality surrounding the government's brief on the retroactivity question.

First, it totally ignores the statements and decisions of this Court that convictions tainted by coerced statements must be set aside and a new trial ordered (Petitioner's Brief, 26-30). Second, it inferentially presumes (Government's Brief, 28-29) that whether a new trial should be granted under such circumstances revolves around whether the coerced statement admitted was truthful or not.

Again, this argument is just one more facet of th
government's attack upon the privilege against self-in
crimination and its purposes. If, as this Court has hel
the privilege is the essential mainstay of the America
system of criminal prosecution by accusation, then an
decision by this Court which upholds the use of a co
erced statement in a trial destroys that system of crim
inal prosecution. It matters not at all that the statemen
be true, or that there is other evidence necessary to con
vict, or that the statement goes to only a portion o
the prosecution's case. If coerced evidence can be use
in a criminal trial, then the American system of crim
inal prosecution can be defined as one which is at lea
in part inquisitorial, or one which is based at least i
part upon evidence procured by or in inquisitorial pro
ceedings. A decision by this Court holding as the gov
ernment urges in this case would not be merely a dec
sion concerning retroactivity, it would be revolutionary
Star Chamber and the Court on High Commission i
their modern guise of reporting statutes would agai
be proper methods by which government could coerc
"true" statements, or at least coerce "true" statement
from an accused which the prosecution honestly be
lieves would corroborate an "ample" or "overwhelming
case against persons suspected of criminal activitie
There is nothing in the history of this nation or fro
the decisions of this Court which foreshadows suc
a violent change in our system of criminal prosecu
tion; *cf. United States* v. *Lucia,* 5 Cir., 416 F. 2d 92
(1969); *Byers* v. *Justice Court,* ..... Cal. 2d ....., 80 Ca
Rptr. 553, 459 P. 2d 465 (1969), Petition for a writ o
certiorari filed *sub nom California* v. *Byers,* January 1
1970, No. 1070.

Further, in its first case concerning the retroactivity of its criminal decisions, this Court announced that retroactivity would be granted where the constitutional safeguard "went to the fairness of the trial—the very integrity of the fact finding process"; *Linkletter* v. *Walker*, 381 U.S. 618, 639. In the case at bar, the constitutional safeguard claimed goes behind "fairness" or "integrity", and goes to the essential nature of the trial itself. Because of the use of the coerced statements, Petitioner was not tried in any trial ever recognized by the American system of accusatorial prosecution. It can be truly said that he was never tried at all, and more than a new trial, he seeks what would be his first constitutional trial.

Since the criterion of purpose inexorably requires retroactivity, there is little reason to review the other factors relating to retroactivity. We think it obvious that past reliance by prosecutors upon their ability to try an accused with the assistance of the fruits of inquisitorial procedures could not militate against the accused's right to a new and constitutional trial. As to the third criterion, the effect on the administration of justice, we also think it irrelevant to coerced confession cases, and further note that the government simply urges guesses upon this Court. We see no good reason to further burden this Court with argument going to this criterion since it has been fully explored, and its myth destroyed, in the Brief for Petitioner in *Elkanich* v. *United States*, Oct. Term, 1969, No. 1142, now pending before this Court, at pp. A. 14-15. Petitioner here fully adopts that argument made by Petitioner in that case. Indeed, we join with Petitioner in *Elkanich* in urging this Court to adopt full and complete retroactivity for its constitutional deci-

sions in criminal law areas. But if this Court deems such a rule inappropriate, we urge that its prior decisions affirming and reaffirming the right of a person to have a trial free from coerced evidence or its fruits be again reaffirmed in the case at bar.

CONCLUSION.

The Judgment of the Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Indiana should be reversed, and this cause should be remanded to the United States District Court for the Northern District of Indiana with directions to vacate and set aside its order denying Petitioner's motion for relief under 28 U.S.C. Section 2255 and to enter its order granting Petitioner a new trial.

Respectfully submitted,

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